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JAMES H. McKENNEY,
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Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 48

WILLIAM H. ANDREWS,
Plaintiff in Error,

vs.

EASTERN OREGON LAND COMPANY.

In Error to the Supreme Court of the State of Oregon.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

S. M. STOCKSLAGER,
GEORGE C. HEARD,
Attorneys for Plaintiff in Error.

PRESS OF BYRON S. ADAMS.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 300.

WILLIAM H. ANDREWS,
Plaintiff in Error,

vs.

EASTERN OREGON LAND COMPANY.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

STATEMENT.

The statement of counsel for defendant in error as to the cause of action and cross-bill, and the procedure prior to the decision by the Court, is correct.

That Court decided the case for the plaintiff in error on his cross-bill, and in the finding of facts said:

> "That the said lands described by plaintiff in the law action, defendant herein, in its complaint herein, and being the lands in controversy herein, are situated *entirely outside the limits of said grant,* more than three miles from said road as actually constructed and surveyed and platted by the said company or its proper officers, and certified by the then Governor of the State of Oregon as aforesaid."

Defendant in error, plaintiff below, appealed to the Supreme Court of the State, which Court reversed the decision of the lower Court, and the case is brought here on writ of error to that Court.

The Supreme Court of Oregon, in reversing the decision of the trial Court, in the opinion, stated:

> "To support his cross-bill, the defendant introduced in evidence, over objection, a certified copy of the original map and plat of the Dalles military wagon road, embraced within townships 1 and 2 south, ranges 16 and 17 east of the Willamette meridian, on file in the office of the Secretary of State, at Salem, Oregon. The accompanying certificates show the original to have been calculated and platted from the field notes of the survey made by D. P. Thompson, the surveyor for the road company, certified by him June 8, 1869, among which is one by George L. Woods, Governor of the State, attested by the Secretary, showing that the plat had been duly filed in his office and that the road had been built and completed in all respects as required by the Act of Congress and by the Act of the Legislative Assembly of the State of Oregon approved October 20, 1868, and that the same had been accepted. The road is indicated on this map by two lines, in the main parallel, although at some points they seem to diverge and at others to converge, so that the distance between them is not altogether uniform. Where it passes the land in dispute, the Government survey sectionizing the public lands is indicated, showing the location of the road with reference thereto. A. W. Mohr, a civil engineer, being called on behalf of defendant, produced a map, which he testified is an enlargement twelve times according to scale of the certified map from the Secretary of State's office, indicating the location of the land in dispute with reference to the line of the road. Upon this map appear produced tangential curves three miles

distant from the points on the road nearest to the land. One set of curves is extended from points designated on the northerly margin and another set from points at the center of the road. Those extended from the margin touch the southwest corner of the fractional southwest quarter of section 7, one cutting the corner squarely, and the other standing inside perhaps a tenth of a mile, but neither of them touching the land in dispute. Those extended from the center of the road, however, do not reach section 7, at any point. Mohr further testifies that the margin of the road is 15 chains distant from the center, and that the road is 30 chains wide at the points designated. This map was also allowed to go in evidence over objections. Defendant then produced and introduced in evidence a certified diagram from the Department of the Interior, showing the primary limits of the wagon road grant as it affects the premises in question. This diagram shows the southwest quarter of section 7 to be within the adjusted primary limits of the grant, and adjustment appearing to have been made with reference to the smallest legal subdivision of the Government survey. * * *

"Neither the Act of Congress nor of the Legislative Assembly of the State required that any such map or plat should be filed in the office of the Governor or of the Secretary of State, nor does it appear that the plat so filed was the one approved by the Secretary of the Interior, representing the final survey and definite location of the road, much less that the Secretary of the Interior made use of the plat or made his adjustment from it as the basis for determining the limits of the grant. * * *

"There is undoubtedly a map of definite location of this road on file with the Land Department (see Wilcox *vs.* Eastern Oregon Land Company, 176 U. S., 51), which forms the real basis for the adjustment of the grant and constitutes the best evidence upon the subject, etc." (Printed Record, pp. 23, 24 and 25.)

ARGUMENT.

Counsel in argument insist that the motion to dismiss or affirm should be sustained upon two grounds, viz.:

1. Because there is no Federal question involved, as the only question decided was one of fact, and

2. Because the Supreme Court of Oregon ruled correctly in the case.

The Question Involved.

That a Federal question is involved is, we think, beyond doubt.

That a claim under the Act of Congress of September 29, 1890, was set up by the plaintiff in error as the basis, and the only basis of his title, was considered and decided by the lower Court in his favor and by the Supreme Court of Oregon against his claim under said Act, was *necessary* to the decision of the case, and was the *only* question considered by the trial Court and the Supreme Court of Oregon, appears from the finding of the trial Court (R., pp. 12-15), and the opinion of the Supreme Court (R., pp. 22 to 26 inclusive).

That all the elements necessary to present a Federal question under the decisions of this Court, are present in the case, seems to be clear.

> Crowell *vs.* Randell, 10 Pet. 368; Murdock *vs.* Memphis, 20 Wall., 590; Baltimore & O. Ry. Co. *vs.* Maryland, 20 Wall., 643.

It is admitted by counsel that the case is in all respects similar to the cases of *Eastern Oregon Land Company vs. Messinger and same vs. Wilcox* (176 U. S., 51-59), except that in those cases patents had been issued to Messinger

and Wilcox, and in the case at bar, no patent was issued to Andrews, but his entry was cancelled because of conflict with the grant of the company and patent was issued to it.

As this Court took jurisdiction of and decided these cases, it is difficult to understand why there is not the same Federal question involved in this case.

Not a Question of Fact, but One of Law.

The sole and only question involved in the case is, whether as a *matter of law*, the tract of land involved, which is admittedly shown by the map of definite location and construction filed by the company in the office of the Secretary of State, as well as in effect by the certified copy of the diagram from the Department of the Interior, showing the primary limits of the grant as it affects the premises in question to be *entirely outside of the limits of the grant*, was properly patented to the company, in the face of the valid entry of the plaintiff in error?

It seems to us the mere statement of the proposition proves conclusively that it is a *legal question*, pure and simple. Doran v. Richard, 187 U.S. 658.

We have seen, the Supreme Court of Oregon conceded that the certified copy of the map filed in the office of the Secretary of State, and the verified enlargement thereof as demonstrated by Mr. Mohr, a civil engineer, showed that whether measured from the center of what is marked on the map by two parallel lines as the line of the road, or from the line nearest the land, in neither case is it within three miles of any part of the road as thus designated. That his measurements by tangential curves three miles distant from the center, or from the margin nearest to the land, is in accordance with the method applied by the Land Department, was decided and illustrated by Secretary

Lamar in the case of Scott *vs.* Kansas Pacific Railway Company (5 L. D., 468). It was there held that this system of measurement had been in continuous operation since 1852, and it is still in operation and the adjustment of the grant involved was intended to be made under that system, but was erroneously made.

The opinion of the Court also in effect, concedes that the diagram of adjustment from the Interior Department shows that *the land involved is outside* of the limits of the grant. Referring to this map the opinion states:

> "This diagram shows the southwest quarter of section 7, to be within the *adjusted* primary limits of the grant, and *adjustment* appearing to have been made *with reference to the smallest legal subdivision* of the Government survey (R., pp. 23 and 24)."

It thus appears that even from the map of adjustment no part of the land involved is *within the limits of the grant*, but that as the limits touched a *part* of the quarter section, the whole quarter was patented to the company. We insist that there is *no legal authority* for patenting to the company, as a *part of its grant*, a *single acre, outside its grant.* This is true even if there were no adverse claim to the land, much more so when a valid entry existed, as in this case.

But, even applying the rule of "the smallest legal subdivision," as the Court finds the diagram shows was done, the Southwest fourth of the Southeast quarter is all that could have been properly patented to the company thereunder. *This forty is not embraced in the claim of plaintiff in error.*

This diagram, *made by the draftsman alone,* from meas-

urements made *by himself only, is submitted to no one, approved by no one, not even the Chief of a Division, let alone the Commissioner of the General Land Office,* but is simply *assumed* to be correct and so acted upon, including the issuance of patent.

Now, if this draughtsman can delimate upon his diagram the limits of the grant, so extended beyond the legal and proper limits as to embrace a quarter section, or even forty acres, "the smallest legal subdivision," without remedy, he may extend it as far as he likes and embrace the entries of settlers, and they would be powerless.

The certified copy of this diagram was introduced for the purpose only of showing how the error in including the land in controversy within the limits of the grant was committed.

The decision of the Supreme Court of Oregon is based upon two palpably erroneous assumptions. Admitting, as it does, that the original map on file in the office of the Governor or Secretary of State, a certified copy of which was introduced in evidence, proved the land in controversy to be outside the limits of the grant, the presumption in contradiction is indulged "that there must be another and different map of definite location on file, accompanied by the field notes of survey."

In support of the first presumption, the court refer to the opinion of this court in Wilcox *vs.* Eastern Oregon Land Company, *supra,* which describes the map of constructed road, a copy of the one on file in the office of the Governor or Secretary of State, as the map of definite location. As to the use of field notes in adjusting the grant, we have just shown what the method is, and need not discuss it further.

The map of *constructed road,* which is the map of *definite location,* filed in the office of the Governor or Secretary of

the State of Oregon, and properly certified by the Governor, is the only guide by which to fix the limits of the grant, and by it, as we have seen the grant as a legal proposition does not embrace any of the land in dispute.

The Map of Constructed Road.

In point of fact, the diagram introduced was made as all such are made, by a mere draughtsman who, following the method hereinbefore shown, delineated the limits *from the map of definite location;* or if none was filed as is the case in this grant, from the *map of constructed road, certified to by the Governor of the State,* which is treated as a map of definite location, and such diagram *is not approved* by any one, and has nothing whatever to do with the determination of the legal question, viz., whether the limit as delineated is in *accordance* with the map of *definite location.*

The only map filed under this grant in the Interior Department, is the original or a *duplicate of the one filed in the office of the Secretary of State of Oregon,* certified to by the Governor, and is a map of *constructed road,* but is treated as a map of definite location, *and fixes the limits of the grant* (Van Wyck *vs.* Knevals, 106 U. S., 366; McDowell *vs.* the Dalles Military Wagon Road Co., 22 L. D., 599).

As before stated the diagram is not approved by any one, and if it differs from the map of definite location, or of constructed road, treated as such, it *cannot affect the rights of anyone.*

The Act making the grant in question *does not require the filing of any map in the Interior Department.* Hence, if one was filed, there was certainly no more authority for it than there was for filing in the office of the Secretary of

State of Oregon. Indeed, not so much, as is shown by the fifth section of the said Act, which is as follows:

> "And be it further enacted, That land hereby granted to said State shall be disposed of only in the following manner, that is to say, when the Governor of said State shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed thirty sections, may be sold, and so on from time to time until said road shall be completed. * * *"

This same map filed in the office of the Governor of Oregon, was recognized, and thus referred to, in the case of Wilcox *vs.* Eastern Oregon Land Company, 176 U. S., 51:

> "Prior to June 23, 1869, the Dalles Military Road Company had duly surveyed and definitely located its line of road between the points designated by Congress and the State, had fully constructed and completed its road, and had filed in the office of the Governor a plat or map upon which was traced and shown the definite location of the road from Dalles City to its terminus on Snake River, as well as the limits of the place and indemnity lands embraced by the Act of Congress."
>
> "On the 23rd day of June, 1869, the Governor certified that such plat or map had been duly filed in his office, and that it showed the route upon which the road was constructed in accordance with the above Acts of Congress, and of the Legislature of Oregon; also that he made a careful examination of the road since its completion, and that the same had been built in all respects as required by those Acts, and had been accepted."
>
> "The above map and the certificate of the Governor were filed by the company in the office of the Secretary of the Interior and on December 18, 1869, the Commissioner of the General Land Office, by order of the Secretary, withdrew from sale in favor of the company

> the odd numbered sections within three miles from each side of the wagon road, as delineated and shown on the map so filed."

If, as stated by this Court, the map filed in the office of the Governor, and certified by him, was subsequently filed in the office of the Secretary of the Interior, and upon it as a basis the withdrawal for the company was made, there is no escaping the conclusion that the one introduced in behalf of plaintiff in error is the same map; or, as conceded by the Supreme Court of Oregon, it was the *original* of which the one filed in the office of the Secretary of the Interior is a duplicate. This being the case, this map is the *only guide* by which the *limits* of the grant can be determined.

It follows that the evidence introduced by plaintiff in error was not only the *best evidence* of the limits of the grant, but was, and is, the *only legitimate* evidence of its limits. And by that evidence it clearly appears that such limits do not *touch any part* of the land in controversy.

The Supreme Court of Oregon, in its opinion in this case, citing as authority therefor the following cases decided by this Court, viz., Doolan *vs.* Carr, 125 U. S., 618, and Burfenening *vs.* Chicago, St. Paul & C. Ry. Co., 163 U. S., 321, said:

> "If the land in dispute was without the grant, the Secretary of the Interior was without authority to place it within, much less to issue a patent therefor to the road company."

And yet this is precisely what he did in the case at bar, as shown by the only evidence competent to establish the limits of the grant, and hence the fact that the land in dispute "is without the grant."

Again, we repeat, it is the legal limits of the grant which must be determined; for upon their determination depends

the question of the authority to issue patent to the company.

That we are correct in our statement that no map of *definite location* was filed by the company, but that the map filed in the office of the Governor was a map of *constructed road*, but treated as a map of *definite location*, is clear from the statements of this Court, as hereinbefore set out.

It is therein declared that on the 23rd of June, 1869, the company *had completed its road*, and on that day filed its map in the office of the Governor, who certified to the completion of the road, "*that the above map and the certificate of the Governor* were filed by the company in the office of the Secretary of the Interior, and on December 18, 1869, the Commissioner of the General Land Office, by order of the Secretary, withdrew from sale in favor of the company the odd numbered section within three miles from each side of the wagon road, as *delineated and shown on the map so filed.*" It is recited by the company on the face of this map that it is a map of definite location and construction from the Dalles to Boise.

This correct statement leaves no doubt but that this map of *constructed* road is the only map of *definite location* ever filed by the company, and settles the question that the withdrawal for the benefit of the company was based wholly upon this map. How, then, can it be truthfully asserted that this map does not fix the line of the road, and hence, by proper measurements, the limits of the grant?

Error Committed by Supreme Court of Oregon.

From the foregoing, it is evident that when that Court, referring to this map, said:

> "But with all this, giving full credence to the plat as indicating the final location of the road as con-

> structed, and conceding that Mohr is correct in his premises, it does not appear to us that it is sufficient to impeach the official record of the Land Department of the General Government; that is to say, it is not the better evidence as to the regularity of the adjustment of the grant,"

Committed an error for which the decision should be reversed.

That the map of *definite location* irrevocably fixes the line of the route, and, therefore, forms the only basis for the establishing of the limits of the grant, is too well settled both by the decisions of this Court and of the Interior Department to require the citation of authorities. *No other map was ever filed by the company.* It follows that no question can arise as to whether the road was constructed on the exact line of definite location, for the reason that the only map filed was filed after the road was completed, as it shows on its face, and hence the authorities cited by counsel are irrelevant.

We insist, therefore, that there is no reason for dismissing the appeal; but, on the contrary, every reason why the case should be not only *considered* on its merits, but should be in all things reversed.

Respectfully submitted,

S. M. STOCKSLAGER,
GEORGE C. HEARD,
Attorneys for Plaintiff in Error.

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OCT 22 1956

JAMES R. BROWNING, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1906.

NO. 48.

WILLIAM P. ANDREWS, *Plaintiff in Error,*

vs.

EASTERN OREGON LAND COMPANY.

In Error to the Supreme Court of the State of Oregon.

BRIEF FOR PLAINTIFF IN ERROR.

I.

Counsel for defendant in error in both their briefs contend that this court has no jurisdiction in the case for two reasons: (a) because there is no federal question involved: (b) for the further reason, that the question raised and decided by the Supreme Court of Oregon was one of fact and therefore not reviewable in this court: (c) and that on the merits, the decision is right.

II.

As to the questions involved in the motion to dismiss, we merely wish to suggest that we are not able to see the distinction which counsel draws between this case and that

of Wilcox vs. The Eastern Oregon Land Company, 176 U. S. 51, which we cited and from which we quoted in our brief heretofore filed. It was conceded by counsel that the only difference between the cases is that in that case patent had issued to Wilcox, which was therein decreed to be invalid as against the Company, as holder of the paramount title under the wagon road grant, while in the case at bar the Secretary cancelled the entry of the plaintiff in error as erroneously allowed and thereupon patented the land under The Dalles military-road grant.

III.

But, it is insisted that the dicision of the Supreme Court of Oregon was based wholly upon a question of fact, viz., whether the land in question was within the limits of the grant under which defendant in error derived title.

This is counsel's way of putting it. We might just as correctly say the whole question involved was whether the company through whom defendant in error claimed title was entitled to land outside the limits of the grant as fixed by law. This was the real question involved, disguise it as we may. And a part of this legal question was the question of the competency of the original map filed by the company in the office of the Secretary of State at Salem, Oregon, or a duly certified copy thereof, as evidence to prove the limits of the grant. It was introduced over the objection of defendant in error and the Supreme Court held that it was not the better evidence as to the regularity of the adjustment of the grant, for the reason that the law did not require such map to be so filed, and for the further reason that the Court presumed that the diagram of the adjustment of the grant was made from the field notes of survey of the road, although it was admitted no such notes accompanied the diagram. That Court further

presumed, without any facts upon which to base such presumption, that there must have been another and different map on file in the office of the Secretary of the Interior from which the adjustment of the grant was made.

It is thus seen that the Supreme Court of Oregon did not question the facts as proven and found by the trial court, viz., that the land was outside of the limits of the grant, but held that the certified copy of the map filed by the company in the office of the Secretary of State was not competent evidence to prove the limits of the grant, because, the court presumed that there must have been another and different map upon which, together with the field notes, the adjustment was made. Now, there can be no question but that the competency of this evidence to prove the limits of the grant is a legal question, and in point of fact the only question which was involved in the decision of the Supreme Court. In the case of Dower vs. Richards, 151 U. S. 658, this court, Mr. Justice Gray delivering the opinion, said:

> (syllabus) "When the question decided by the State Court is not merely of the weight or sufficiency of the evidence to prove the fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal Law, the decision may be reviewed by this Court."

The cases of Mackey vs. Dillon, 45 U. S. (4 How. 421), and Lytle vs. Arkansas, 63 U. S. (22 How.), 193, and many other cases in support of the decision were cited.

The Supreme Court of Oregon based its opinion of the incompetency of the certified copy of the map offered as evidence upon the ground that the law making the grant did not require the filing of the map of the road with the Secretary of State or the Governor, but that there evidently was a map filed in the office of the Secretary of the Interior. In point of fact, the law does not require the filing of a

map in either office. But, it does require that the land granted to the State shall be disposed of only, "when the Governor of said state shall certify to the Secretary of the Interior that ten continuous miles of said road are completed, then a quantity of the land hereby granted, not to exceed 30 sections, may be sold, and so on from time to time until said road shall be completed." * * *

How could the Governor certify to the completion of ten miles of the road, under the grant, without having a map of the definite location of the road? That the map introduced in evidence did show this fact is admitted by the Supreme Court of Oregon in the following language:

> "The certificate of Governor Wood's attests that the plat shows in connection with the public surveys, so far as then made, the location of the line or route as actually surveyed and upon which the road company's road was constructed, and that the road had been built and completed in all respect as required by the Acts of Congress and the Legislature of the State."

Again, the Supreme Court of Oregon, in referring to this plat or map, said:

> "To support his cross-bill, the defendant introduced in evidence, over objection, a certified copy of the original map and plat of The Dalles military wagon road, embraced within Townships 1 and 2 S., Ranges 16 and 17 E. of the Willamette Meridian, on file in the office of the Secretary of State, at Salem, Oregon. The accompanying certificates show the original to have been calculated and platted from the filed notes of the survey made by D. P. Thompson, the surveyor for the road Company, certified to by him June 8, 1869, among which is one by George L. Woods, Governor of the State, attested by the Secretary, showing that the plat had been duly filed in his office and

> that the road had been built and completed in all respects as required by the Act of Congress and by the Act of the Legislative Assembly of the State of Oregon, approved Oct. 20, 1868, and that the same had been accepted."

In the case of Wilcox vs. Eastern Oregon Land Company, *supra,* this court referring to this same map, said:

> "Prior to June 23, 1869, The Dalles Military-road Company had duly surveyed and definitely located its line of road between the points designated by Congress and the State, had fully constructed and completed its road, and had filed in the office of the Governor, a plat or map upon which was traced and shown the definite location of the road from Dalles City to its terminus on Snake River, as well as the limits of the place and indemnity lands embraced by the Act of Congress."

The Supreme Court of Oregon in effect says, this map introduced in evidence by plaintiff in error, and the measurements upon it by tangential curves, in accordance with the rule laid down by Secretary Lamar in the case of Scott vs. Kansas Pacific Ry. Co. (5 L. D. 468), proves the land in controversy to be outside of the limits of the grant as fixed by the Act of Congress, but this map is not competent evidence to prove the line of definite location and the limits of the grant; that it does not overcome the presumption that another and different map was filed in the office of the Secretary of the Interior, and that from this map together with the field notes of survey the diagram of adjustment was made. This is the whole case in a nut shell.

Both of the presumptions of the Supreme Court of Oregon are not only not based upon facts, but they are in the face of what is well known to be the truth.

First, no other map except that of completed road, de-

scribed by this court in the Wilcox case, and treated as a map of definite location, was ever filed by the company. *This will not be disputed.* The decision of the Supreme Court of Oregon admits the original was filed in the office of the Secretary of State by the company and certified to by the Governor of the State, and in the decision of this court in the Wilcox case, it was said, referring to this same map:

> "The above map and the certificate of the Governor were filed by the company in the office of the Secretary of the Interior and on Dec. 18, 1869, the Commissioner of the General Land Office, by order of the Secretary, withdrew from sale in favor of the company the odd numbered sections within three miles from each side of the wagon road, as delineated and shown on the map so filed."

Can there be any question whatever that this map or a duplicate of it was the map, and the only map filed by the company, which, being a map of completed road was, and ever since has been, treated as the map of definite location. This being true, the map offered in evidence was not only competent, but the only competent evidence to prove the line of definite location, and therefore the limits of the grant on each side of the road. Hence the presumption that there was another and different map on file in the office of the Secretary of the Interior not being based on any fact admitted or proved can have no weight.

> "Presumptions must be based upon facts and cannot be drawn from other presumptions. A. and E. Enc. of L. Vol. 19, p. 39."

Wharton on evidence lays down the doctrine that "presumptions of fact require the production of evidence as a preliminary."

In the case of Manning vs. John Hancock Mut. L. I. Co., 100 U. S., 10 Otto. 693 this court said:

> "But the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. The only presumptions of fact which the law recognizes are immediate inferences from facts proved."

Equally erroneous is the presumption of the Court that the adjustment of the grant was based upon the field notes of survey. We think there is no doubt but that the court will take judicial notice of the methods of doing business in the Interior Department and in the Office of the Commissioner of the General Land Office.

In the case of Caha vs. U. S., 152 U. S. 211, this court held that the courts of the U. S. take judicial notice of the rules and regulations prescribed by the Interior Department in respect to contests before the Land Office. And, in the case of Heath vs. Wallace, 138 U. S. 578, this court held that the Supreme Court of the U. S. may take judicial notice of official statements made by the head of one of the branches of the Executive Department, which relate to the public records under his control. A number of other cases might be cited upon this point, but we deem these sufficient.

In our original brief we asserted, and we again insist that what is known as the diagram showing the limits of a grant as adjusted to the line of the road, is the work of a mere draughtsman, which is not approved or passed upon by any official connected with the Department. The line of definite location being fixed, a map containing this is sent by the chief of the R. R. division to the Drafting Division of the General Land Office where a clerk, under the method of measurements adopted, marks on this, or another map, the limits of the grant, depending upon the

number of miles it extends on each side of the road. Now we again assert that this work is not reviewed, considered, approved or in any other manner passed upon by the Secretary, the Commissioner of the Land Office or even by a Chief of a Division. Hence, if an error is made by this draughtsman, his work without any other consideration is carried into a patent or certification of title as the case may be.

We are not left in doubt as to the method of making this adjustment, for as before stated a question arose during the time Mr. Lamar was Secretary of the Interior, and he was called upon to determine just how this adjustment should be made, and in the case of Scott vs. The K. P. Ry. Co., *supra*, wherein he overruled the action of the Commissioner, he specifically pointed out and illustrated by a diagram, the exact method which had been pursued according to his statement since 1852, to which we invite the attention of the Court. An examination of this decision and an inspection of the illustration accompanying it will show conclusively that the erroneous assumption of the Supreme Court of Oregon that the field notes of survey were considered in making an adjustment of the grant is without any foundation whatever in fact.

We come back then to our original position, viz., that the real question decided by the Supreme Court of Oregon upon which the case turned, was whether because of the statement of the court that the law did not require the filing of the map in the office of the Secretary of State or Governor, and that the court presumed there was another and different map filed in the office of the Secretary of the Interior, from which, together with the field notes of survey, the adjustment was presumed to have been made, the certified copy of the map introduced in evidence was not competent evidence to prove the line of definite location of the road, from which the limits could be determined. That

this court has jurisdiction to review that question, we think goes without saying.

If we are right in our position, then, not only is a federal question presented for review, but, upon the merits the case must be reversed.

In view of the decision of this court in the Wilcox case, *supra,* it must be held that this map which was introduced was competent evidence to prove the line of definite location, and that as admitted by the Supreme Court of Oregon, and found by the trial court, the measurements by tangential lines three miles from the center of the road did not touch any part of the quarter section involved, and that measured from the line nearest the land, which was assumed to be the margin of the road, only a part of the smallest legal subdivision of the quarter, *which legal subdivision is not embraced in the claim of plaintiff in error,* was touched by the three-mile limit as thus shown.

This leaves only one suggestion, which, is probably not involved in this case, but which we consider important. and that is, whether the Land Department has any power whatever by its system of adjustments to the smallest legal subdivision to patent to a R. R. or other company having a grant from Congress, a single acre of land beyond the limits of the grant as fixed by law, under any circumstances. And especially, can this be done in the face of an adverse claim to the land? We have insisted it cannot be done. As between the Government and a grant claimant, perhaps it would make no particular difference in the number of acres received as the gains and losses would be about equal, but if a settler was claiming a 40 acre tract, which is the smallest legal subdivision and the adjustment of the R. R. Company's grant, showed it was entitled to 21 of the 40 acres, there certainly can be no good reason why it should be permitted to take the 19 acres from the settler, to which it was in no wise entitled.

We refer to this because the Supreme Court of Oregon in its decision apparently not knowing how else in view of the finding of the trial court and the facts as presented to it, to hold that this land was within the limits of the grant, when it was clearly shown to be outside thereof, stated that, "adjustment appearing to have been made with reference to the smallest legal subdivisions of the Government survey."

As to the point suggested by counsel, that the land was withdrawn for the benefit of the wagon-road company, in 1869, and that the settlement of the plaintiff in error commenced in 1886, and that therefore he has no equities, we hardly think has much force. The only question involved in this case is, whether the limits of the grant embraced the land in controversy? The Supreme Court of Oregon in its decision, citing decisions of this court, admitted that if the land was without the grant, the Secretary of the Interior was without power or authority to place it within, much less to issue a patent therefor to the road company. This is certainly the correct doctrine and the fact that the land had been withdrawn can cut no figure whatever in the case, in our opinion.

Respectfully submitted,

S. M. STOCKSLAGER,

Attorney for Plaintiff in Error.

JAMES F. MOORE,

Of Counsel.